IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

WRIT PEITION NO.546 OF 2006

Ramesh Silk Mills & Ors. ...Petitioners.
Versus
Sheetal D. Kamdar. ...Respondent.

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Mr. V.Y. Sanglikar with Mr. S.G. Vakil for the Petitioners.
Mr.Dara Zaiwala, Sr. Advocate with Mr. Ayaz Bilawala, Mr.Krishnakan Shah and Ms.Rashida Kutty i/b. Bilawala & Co. for the Respondent.

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CORAM : DR. D.Y. CHANDRACHUD, J.

June 28, 2006.

ORAL JUDGMENT:

Rule, by consent of Counsel returnable forthwith. Counsel appearing on behalf of the Respondents waives service. By consent of Counsel and at their request taken up for hearing and final disposal.

2. In September 1979, the original landlord instituted a suit for eviction, RAE & R.Suit No.1230/4235 of 1979, against the Petitioners under Section 12(3)(a) of the Bombay Rent Act, 1947. The ground for eviction that was set up was a default in the

payment of rent since 1st December 1978. The premises which form the subject matter of the suit for eviction were transferred to the Respondent by a Deed of Conveyance dated 29th March 1990. The Deed of Conveyance contains a reference to several suits which were instituted by the original landlord against his tenants. Among them the schedule to the Deed of Conveyance specifically refers to the suit for eviction that was instituted against the Petitioners. The conveyance provides that the entire property admeasuring 2289 sq. yards, bearing Survey No.61, Hissa No.5A (Part) corresponding CTS No.666 was transferred to the Respondent together with a structure situated thereon and the claims and benefits arising out of the suits that were pending before the Court of Small Causes. The Respondent as the purchaser of the immovable property was entitled to the benefit of the pending suits and was authorised to pursue the claims until they were finally decided. The relevant parts of the Deed of Conveyance are as follows:

> "They the Vendors do and each of them doth hereby grant, sell, transfer, convey, assign and assure unto the Purchaser all that piece or parcel of land or ground situate at Village Mohili, Taluka South Salsette, Bombay Suburban District in the Registration District and Sub-District of Bombay City and Bombay Suburban bearing Survey No.61 Hissa No.5A (Part) and containing by

admeasurement 2289 square yards i.e. 1913.901 sq.meters and now forming part of C. T. S. No.666 and more particularly described in the Schedule hereunder written and more particularly shown surrounded by a red colour boundary line on the plan thereof annexed hereto together with the structure standing thereon as also all suits filed in the Court of Small Causes at Bombay as per the particulars set out in the Annexure hereto and the claim and benefit thereof till the same are finally decided (hereinafter referred to as the said property)."

3. The suit for eviction proceeded on the foundation that the Petitioners were monthly tenants in respect of Block No.8 in Hyfa Building No.2 on terms and conditions conditions contained in an agreement of 16th November 1977. Under the agreement, the Petitioners had agreed to pay a monthly rent of Rs.1141/- and in addition, all taxes which were prevailing on the date of the agreement which amounted to Rs.380/-. The tenancy was terminated by a letter dated 4th April 1978 on the that the Petitioners had defaulted in the payment of rent and the cheque that was issued by them had been dishonoured. The original landlord instituted a suit being RAE &R. Suit No.1039/3650 of 1978 seeking a decree for eviction on the ground of arrears of rent. The suit came to be compromised on 16th December 1978. Under the Consent Terms that were arrived at between the Petitioners and

the landlord, the Petitioners agreed to pay rent of Rs. 1746.58 p.m. from 1st December 1978 and at the rate of Rs. 2000/- p.m. from 1st January 1979. The case of the original landlord was that the Petitioners failed to pay rent from December 1978. A cheque in the amount of Rs. 1746.58 remitted for December 1978 was not honoured. A notice of demand was accordingly addressed on 7th March 1979. It was averred therein that on 18th June 1979, the Petitioners had sent a banker's cheque for one month's rent, but by that date over six months' rent was in arrears. Thereupon, a further notice demand was addressed to the Petitioners on 25th June 1979 calling upon the Petitioners to pay the arrears of rent which were for a period in excess of six months from 1st December 1978. The suit for eviction was thereupon instituted in September 1979 on the foundation that despite receipt of the notice of demand, the arrears of rent had not been paid within a period of one month as required by Section 12(3)(a) of the Bombay Rent Act, nor was an application filed for fixation of standard rent. The Petitioners filed a Written Statement and denied the allegations contained in the plaint. During the pendency of the suit, the Respondent acquired the right, title and interest in respect of the immovable property including the suit premises, by a registered

Deed of Conveyance dated 29th March 1990. In October 1998, the plaint came to be amended and the name of the original Plaintiff was deleted. Issues were framed. The Respondent came to be substituted instead and in place of the original Plaintiff. Moulik Dhirajlal Kamdar, the son and Constituted Attorney of the Respondent deposed on behalf of the Respondent.

4. The Trial Court held that the right to recover the arrears of rent had not been assigned to the Respondent and that accordingly, the suit for eviction could not be maintained or continued by the Respondent herein. In view of this finding, the Trial Court did not adjudicate upon whether the Petitioners were in arrears of rent for more than six months and whether there was a default in the payment of rent. Upon the matter being carried in appeal, the Appellate Bench of the Court of Small Causes reversed the judgment of the Trial Court. The Appellate Court held upon an interpretation of the Deed of Conveyance that in terms of the rights which were conferred on the Respondent by the Deed of Conveyance, the Respondent was entitled to continue the suit which had been instituted by the erstwhile landlord and to the benefit of such orders that may be passed therein. The Appellate

Bench then adjudicated upon the question of default and came to the conclusion that despite service of a notice of demand dated 26th June 1979, the Petitioners neither deposited the rent which was in arrears for a period of six months, nor had they instituted an application for fixation of standard rent. In the circumstances, the Appellate Court held that a decree was liable to follow under Section 12(3)(a) of the Bombay Rent Act as it then stood.

5. At the hearing of the Petition, the first submission that was urged on behalf of the Petitioners is that under Section 109 of the Transfer of Property Act, 1882 upon an assignment of property the right to recover arrears of rent does not stand transferred to the transferee unless there is a contract to the contrary. Section 109 of the Transfer of Property Act provides as follows:

> "109. Right of lessor's transferee.- If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contrary to the contrary, shall possess all the rights, and if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him:
>
> Provided that the transferee is not entitled to

> arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.
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> The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased."

These provisions have been interpreted by the Supreme Court in **Sheikh Noor v. Sheikh G.S. Ibrahim,**[1] and the principle of law has been enunciated in the following terms :

> "... the correct position of law is that a transferee is not entitled to recover the arrears of rent for the property on transfer unless the right to recover the arrears is also transferred. If right to recover the arrears is assigned, then the transferee/landlord can recover those arrears as rent and if not paid maintain a petition for eviction under the rent laws for those arrears as well."

The same view had been taken in an earlier decision of the Supreme Court in **N.M. Engineer v. Narendra Singh Virdi.**[2] **Engineer**'s case, it may be noted, was upon an appeal preferred against a judgment of this Court in a case which arose under

1 AIR 2003 SC 4163
2 AIR 1995 SC 448

Section 12(3)(a) of the Bombay Rent Act, 1947. The Supreme Court held there that in view of the proviso to Section 109, the appellant-assignee was not entitled to rent before assignment since that was merely a debt.

6. Now, in the present case the suit was originally instituted by the erstwhile landlord. There could not have been any dispute about the right and entitlement of the then owner to demand arrears of rent or to institute a suit for possession upon a default in the payment of rent. He made a demand for arrears and sued for possession during the tenure of his ownership. Rightly, that has not been disputed. The suit for eviction was instituted by the erstwhile owner in 1979 much prior to the Deed of Conveyance and there can be no dispute about the proposition that on the date when the suit was instituted, it was competent to the owner of the premises as the landlord to maintain such a suit. The Respondent acquired the right, title and interest of the erstwhile owner by a Deed of Conveyance on 29th March 1990. The Deed of Conveyance specifically provides that the vendor has transferred, conveyed and assigned to the Respondent the land as well as structure standing thereon. The Deed of Conveyance recites that

the vendor had instituted several suits before the Court of Small Causes and that the Respondent as the purchaser would be entitled to the benefit thereof and to pursue the litigation until it was finally decided. In view of the clear and express terms of the Deed of Conveyance, it cannot possibly be submitted that the Respondent was not entitled to continue the suit which was instituted by the erstwhile landlord or that there was no assignment of the right to receive the past arrears of rent. Plainly the entitlement of the Respondent to pursue the litigation instituted by the erstwhile landlord and to the benefit of the decree that may be passed therein included the right to continue the proceedings for recovery of possession on the ground of arrears and to sue for the arrears of rent. The suit which was instituted against the Petitioners was specifically adverted to in the schedule to the Deed of Conveyance. In that view of the matter, the finding of the Appellate Bench on this aspect is not in error.

7. However, it was submitted that even if the Appellate Court was inclined to reverse the finding of the Trial Court on whether the suit was or was not maintainable the appropriate course of action for the Appellate Bench was to remand the

proceedings back to the Trial Court for a primary determination of the question that arises in a suit for eviction under Section 12(3)(a) of the Bombay Rent Act. It was next submitted that in proceedings arising out of a suit instituted by the Petitioners on the Original Side of this Court, the Court Receiver was appointed as receiver of the premises and of the plant, machinery and equipment situated therein on 13th May 1998. It was urged that the Respondent ought to have impleaded the Court Receiver after obtaining permission from the Court. This not having been done, the decree was a nullity, in view of the principle of law enunciated by the Supreme Court in **Everest Coal Company vs. State of Bihar**.[3]

8. In so far as the appointment of a Receiver is concerned, it emerges from the compilation which has been placed on the record of this Court that the Petitioners instituted Suit No.1799 of 1998 before this Court inter alia for a declaration that the business of Ramesh Silk Mills and the factory, plant and machinery were owned by and belonged to the Petitioners and that the Defendants to the suit had no right, title or interest therein from May 1995. The

3 U.J. (S.C.) 1977 659

case of the Petitioners therein was that the business had been given for conducting to the Second Defendant to the suit and though the conducting agreement had come to an end, possession had not been restored to the Petitioners. The Respondent was not a party to the suit. On 13th May 1998, this Court appointed a Receiver in terms of prayer clause (a) to the Notice of Motion. The Court Receiver was directed to take formal possession of the suit premises together with the plant, machinery and equipment situated at Hyfa Building, Kurla-Andheri Road, Mumbai. The ad-interim order was confirmed on 10th August 1999 at the hearing of the notice of motion.

9. In the Writ Petition before this Court, an amendment has been carried out in March 2005 and in paras 12(a) and 12(b) it has been averred that in pursuance of the orders passed by this Court in the said suit, the Petitioners continued to act as agents of the Court Receiver. The Court Receiver put up a Board on the premises and it has been submitted that the affidavit that has been filed in these proceedings would show that the Respondent was aware of the appointment of the Receiver.

10. Now, it is necessary to note that in these proceedings the Respondent has relied on an affidavit of one Sahebrao Kaluram Bhintade. The aforesaid person was the Second Defendant to the suit instituted on the Original Side of this Court by the Petitioners. The aforesaid person was in fact the person with whom it is alleged that a conducting agreement was entered into by the Petitioners. In para 5 of the affidavit, it has been disclosed that in the suit instituted by the Petitioner, the Court Receiver was appointed as receiver. It is urged on behalf of the Respondent that the Respondent was not aware of the appointment of the Receiver. This cannot be accepted. For one thing, the submission that the Receiver put up his board on the premises has not been controverted. Secondly, it is the Respondent who has produced before this Court the affidavit of the Second Defendant to the suit who had been inducted as a conductor by the Petitioners in which a disclosure about the proceedings is made. The property is custodia legis and it was necessary for the Respondent to obtain the leave of the Court to join the Court Receiver to the proceedings before the Court of Small Causes. This has not been done.

11. In so far as the merits of the decree for eviction on the

ground of default are concerned, a considerable degree of reliance has been placed by the Counsel for the Petitioners on the following admissions of P.W. 1 during the course of cross-examination before the Court of Small Causes :

> "The defendants were irregular in paying the monthly rent. I am not sure since when he was in arrears of rent prior to 1979 but I am aware that defendant is in arrears of rent from sept. 1991 till onwards after my mother purchase the suit property. Therefore the previous landlords have issued the demand notice dt. 4th April 1978 calling upon the defts. to pay the arrears of rent and possession of the suit premises. At present I am not aware whether defts. have received the said demand notice; however defts. have not paid the arrears of rent to the previous landlords. Therefore, the earlier landlord has filed RAE&R Suit No.1039/2650 of 1979 that suit was settled." (emphasis supplied).

Counsel for the Petitioners submitted that the appropriate and proper course of action for the Appellate Court was to remand the matter to the Trial Court since the Trial Court had not expressed any view on the merits of the alleged default as a ground for eviction. There is merit in the submission urged on behalf of the Petitioners that if the Trial Court were to decide the question of default on merits, it would be open to the Petitioners to place the relevant facts including the admissions made on behalf of the Respondent, as noted above. The Petitioners have been deprived

of that opportunity since the Trial Court did not enquire into the issue of default on merits in view of its finding that the suit was not maintainable. Having regard to all these facts and circumstances of the case, I am of the view that the appropriate course of action would be to remand the matter back to the Trial Judge in the Court of Small Causes. The Respondent would in the meantime be at liberty to adopt necessary proceedings in accordance with law to obtain the leave of this Court on the Original Side in Suit No.1799 of 1998 to implead the Court Receiver as a party to the proceedings before the Court of Small Causes and to continue the suit. The Trial Judge shall thereupon decide the issues raised before the Court afresh after hearing the parties on merits. It is however, clarified that the point regarding the maintainability has been concluded by the present judgment. All the other rights and contentions of the parties on the other matters in dispute are kept open. The suit shall be decided on the basis of the evidence already on the record. Parties shall appear before the Trial Judge for receiving directions on 17th July 2006. The Trial Judge shall endeavour to conclude the proceedings, in the event that leave is obtained by the the Respondent in Suit No.1799 of 1998 on the Original Side of this Court, within three months.

12. During the pendency of the present proceedings, the Petitioners had deposited an amount of Rs.1 lakh towards the arrears of compensation. Counsel appearing on behalf of the Petitioners states on instructions that a further sum of Rs.1 lakh shall be deposited in the Court of Small Causes within a period of two months from today. The Respondent would be at liberty to withdraw the amount of Rs.1 lakh which has been deposited before this Court as well the additional amount of Rs.1 lakh upon deposit before the Court of Small Causes. This would be without prejudice to the rights and contentions of the parities including the entitlement, if any, of the Respondent to file an application before the Court of Small Causes for the deposit of the balance of arrears, if any.

13. The petition is accordingly disposed of.

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